

Imprimis

OVER 2,600,000 READERS MONTHLY

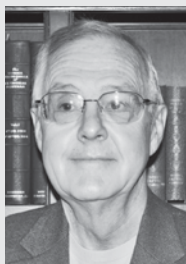
November 2012 · Volume 41, Number 11

40th Anniversary

Is the Constitution Colorblind?

Edward J. Erler

California State University, San Bernardino



EDWARD J. ERLER is professor of political science at California State University, San Bernardino. He earned his B.A. from San Jose State University and his M.A. and Ph.D. in government from the Claremont Graduate School. He has published numerous articles on constitutional topics in journals such as *Interpretation*, the *Notre Dame Journal of Law*, and the *Harvard Journal of Law and Public Policy*. He was a member of the California Advisory Commission on Civil Rights from 1988-2006 and served on the California Constitutional Revision Commission in 1996. He is the author of *The American Polity* and co-author of *The Founders on Citizenship and Immigration*.

The following is adapted from a lecture delivered at Hillsdale College on September 9, 2012, during a conference on “The Supreme Court: History and Current Controversies.”

An important case was heard by the Supreme Court last month involving a race-conscious affirmative action program at the University of Texas. This case, *Fisher v. Texas*, will decide whether racial classifications intended to promote student diversity are consistent with the Equal Protection Clause of the Fourteenth Amendment. This question, of course, had already been answered in *Grutter v. Bollinger* in 2003, when the Court approved a race-conscious admissions plan at the University of Michigan Law School. But the situation at the University of Texas is somewhat different and may provoke the Court to reconsider its 2003 decision.

Another case that the Supreme Court will have to take up in the near future involves what appears to be an unresolvable conflict in the Civil Rights Act of 1964. As originally passed, the Civil Rights Act prohibited employment discrimination against any individual on the basis of race, ethnicity, or sex. A later amendment, the Civil Rights Act of 1991, added a “disparate impact provision,” which allows a claim of discrimination to be established on the basis of disproportionate racial results. The impossible situation here is that to avoid a disparate impact violation, employers might feel themselves obligated to engage in racial discrimination in order to achieve

acceptable results.

In *Ricci v. DeStefano*, decided in 2009, the Supreme Court ruled that a municipality could not discriminate against individuals on the basis of race in order to insulate itself against a claim of disparate impact. The city of New Haven, Connecticut, held competitive examinations for promotions within its fire department. Even though the test had been professionally designed to eliminate racial and ethnic bias, all who scored high enough for promotion were white or Hispanic. In order to avoid a disparate impact charge that surely would be brought by black firefighters, the city discarded the exam results and did not promote any of the candidates. This disappointed those firefighters who had passed the exam, and *they* claimed disparate treatment under the Civil Rights Act. The Court in the *Ricci* decision attempted to avoid the intractable contradiction in the law by arguing that New Haven had no “strong basis in evidence” that it would have lost a disparate impact challenge and therefore its discrimination against the individuals who passed the exam violated the prohibition against racial treatment. The Court, however, gave no credence to the argument that the equal protection guarantees of the Civil Rights Act are at war with its disparate impact provisions.

The idea behind the disparate impact provision added in 1991 was that equal opportunity can be measured only by equal results. Whenever a policy does not produce equal results there is a presumption of racial discrimination. In fact, President

Lyndon Johnson had set the stage for this understanding of civil rights in a speech he gave at Howard University in 1965. “[F]reedom is not enough,” Johnson said. “[T]he next and the more profound stage of the battle for civil rights” is “not just equality as a right and a theory but equality as a fact and equality as a result.” “To this end,” Johnson continued, “equal opportunity is essential, but not enough.” The sweep of Johnson’s pronouncement was almost breathtaking. There is no doubt that the principle of distributive justice embodied in the Civil Rights Act of 1964 was equal opportunity. But if equal opportunity is not enough, then some form of *unequal* opportunity will be necessary to achieve equality of result. Thus restrictions on the freedom of some would be the necessary condition for the advancement of others—those who came to be known in affirmative action parlance as “specially protected classes” or “preferred classes.”

It was precisely in this sense that the Supreme Court ruled in 1980 that in federal affirmative action programs using racial quotas “as a remedy to cure the effects of prior discrimination . . . a ‘sharing of the burden’ by innocent parties is not impermissible.” Eventually, however, the Court began to backtrack on the idea that equal protection rights were conditioned by racial class considerations, and in 1995 it overruled its 1980 decision. A majority of the Court now seems to accept the idea that equal protection rights belong to individuals and not to groups—that equal protection rights are not conditioned by

Imprimis (im-pri-mis),
[Latin]: in the first place

EDITOR

Douglas A. Jeffrey

DEPUTY EDITORS

Rebecca Burgess
Timothy W. Caspar

COPY EDITORS

Emily Sarver
Monica VanDerWeide

ART DIRECTOR

Angela E. Lashaway

MARKETING DIRECTORS

William Gray | Fred Hadra

PRODUCTION MANAGER

Lucinda Grimm

CIRCULATION MANAGER

Wanda Oxenger

STAFF ASSISTANTS

Robin Curtis
Kim Ellsworth
Kathy Smith
Mary Jo Von Ewegen

Copyright © 2012 Hillsdale College

The opinions expressed in *Imprimis* are not necessarily the views of Hillsdale College.

Permission to reprint in whole or in part is hereby granted, provided the following credit line is used: “Reprinted by permission from *Imprimis*, a publication of Hillsdale College.”

SUBSCRIPTION FREE UPON REQUEST.

ISSN 0277-8432

Imprimis trademark registered in U.S.
Patent and Trademark Office #1563325.



HILLSDALE COLLEGE
PURSUING TRUTH · DEFENDING LIBERTY SINCE 1844

racial or ethnic class considerations. Yet Justice Scalia, in his concurring opinion in *Ricci*, rightly lamented the fact that the majority opinion did not reach the constitutional question but rather rested its holding exclusively on statutory grounds. Justice Kennedy, writing for the majority in *Ricci*, failed to resolve the massive contradiction that remains at the heart of the Civil Rights Act.

James Madison frequently remarked that “all just and free government derives from social compact.” Indeed, this is the basis of government in the Declaration of Independence, which specifies that the “just powers” of government derive from the “consent of the governed.” Because “all men are created equal”—because, that is, no one by nature has the right to rule anyone else—the only legitimate source of rule is the consent of those who are to be ruled, and the only legitimate reason for consent is for the “safety and happiness” of those who agree to be ruled. In agreeing to join civil society, each individual freely accepts the obligation to protect the rights of fellow citizens in return for the protection of his own rights. The “just powers” of government are thus directed to the equal protection of the equal rights of those who consent to be governed. Equal rights—life, liberty, and the pursuit of happiness—derive from “the laws of nature and of nature’s God.” Equal protection of those rights is the very definition of the rule of law. Equal protection of the laws is thus intrinsic both to the social compact and to the Constitution.

The Constitution states that “We the people . . . do ordain and establish . . . this Constitution,” not that the Constitution creates the people. The people were created by the Declaration of Independence, which mentions the people both in their political capacity—“one people”—and in their moral capacity—a “good people.” Once the people are established, Madison says, a second contract is necessary, this time between the people in its political capacity and the government. By this

An audio version of *Imprimis* is available online at hillsdale.edu/imprimis

second contract, the people consent to be governed under the forms of the Constitution and those who occupy the constitutional offices of government pledge to use their powers exclusively to “promote the general welfare” and “secure the blessings of liberty” to the people. However, should the government act in a settled way to disfranchise the people of their rights, the people always reserve the right to alter or abolish the government in order to secure new forms that are better calculated to promote their “safety and happiness.” This is what has come to be known as the right of revolution, a necessary attribute of the people’s sovereignty which serves as the ultimate guarantee of every other right. The right to alter or abolish government is the only obligation mentioned in the Declaration because it is the ultimate expression of the people’s sovereignty.

The Constitution was intended by the Framers to put the principles of the Declaration into practice. But as in all things political, it is never possible to translate theory directly into practice. Insofar as the Constitution allowed the continued existence of slavery, it was only an incomplete expression of the Declaration’s principles. Madison argued that the compromises with slavery were necessary to secure the adoption of the Constitution—otherwise the slave-holding states would have bolted the Constitutional Convention. And as the most thoughtful of the Federalists understood, without a strong national government the prospects of ever ending slavery—of ever bringing the Constitution into complete harmony with the Declaration—were remote. Thus the prudential compromises regarding slavery in the Constitution were actually in the service of eventual emancipation. Adoption of the Declaration made the abolition of slavery a moral imperative.

Chief Justice Taney, in the *Dred Scott* case in 1857, denied that the Declaration carried any such imperative, infamously

denying that blacks of African descent were included in the phrase “all men are created equal.” His proof was that the Founders did not abolish slavery at once. Taney, of course, misses the important ingredient of democratic statesmanship that guided the Framers.

In his response to *Dred Scott*, Lincoln insisted that the authors of the Declaration

intended to include all men, but they did not intend to declare all men equal in all respects.... They defined with tolerable distinctness, in what respect they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness”.... They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them.

Nor, Lincoln continued, did the Framers have the power to equalize everyone all at once. The statement that “all men are created equal” was placed in the Declaration to set up a “standard maxim,” a moral and political guide for the future—an attempt “to declare the right, so that the enforcement of it might follow as fast as circumstances should permit.” This “standard maxim” would be

familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.

The principle of constitutional statesmanship advocated here by Lincoln—one that he learned from the Founders—was this: eliminate as much evil as possible, while possible, without destroying the basis for the elimination of further evil. This was a statesmanship that was utterly alien to Chief Justice Taney—and it was Taney’s

singular lack of understanding that was the proximate cause of the Civil War.

The American Founding was not completed until the Civil War had been won and the Reconstruction Amendments had been adopted—the Thirteenth, which abolished slavery; the Fourteenth, which established the citizenship of the newly freed slaves and extended to them the panoply of civil rights that are the necessary incidents of federal citizenship; and the Fifteenth, which secured the right to vote. The framers of these amendments frequently referred to the Declaration as the organic law of the nation, and their constant theme was the necessity of completing the regime of the Founding.

Speaking of the Fourteenth Amendment’s Equal Protection Clause, one of its principal architects noted that “this abolishes all class legislation . . . and does away with the injustice of subjecting one caste of persons to a code not applicable to another.... It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.... Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining.” Similar sentiments were expressed frequently in the debates over the Civil Rights Act of 1866, which protected the rights of “citizens of every race and color” to make contracts, to own and convey real and personal property, and generally “to full and equal benefit of all laws and proceedings for the security of person and property,” and which eventually became the basis for the Fourteenth Amendment. There is no doubt that in the minds of its framers, the Equal Protection Clause in the Fourteenth Amendment was an expression of the principles of the Declaration of Independence—which in constitutional terms meant the equal protection of equal rights.

Let us then return to the affirmative action case of *Fisher v. Texas*. An amicus brief filed by several prominent law

professors supporting the University's race-conscious admissions program argues that the framers of the Fourteenth Amendment contemplated the use of race-conscious laws in pursuit of equal protection of the laws. Specifically, they point to the Freedmen's Bureau Bill passed in 1865 and re-passed in 1866. Since these bills were debated and passed in near proximity to the debates over the Fourteenth Amendment, the law professors make a simple equation: since the Freedmen's Bill embraces race-conscious action, this must be true of the Fourteenth Amendment as well.

The Freedmen's Bill was indeed directed at protecting the newly emancipated slaves from continued violence and preventing their reinslavement under a system of indenture or peonage. But a quick glance at the legislative history of the Freedmen's Bill demonstrates conclusively that the law professors misrepresent it. The full title of the Freedmen's Bill is "An Act to establish a Bureau for the Relief of Freedmen and Refugees." Its principal sponsor explained that the bill "would provide for refugees and freedmen, refugees of all colors as well as freedmen, in order that all shall have . . . temporary relief . . ." The relief, he explained, "extends alike to blacks and whites and to all colors."

The Freedmen's Bill was a war powers measure designed to protect all refugees—freedmen as well as white loyalists. The law professors' claim that it is evidence that the Fourteenth Amendment allows race-conscious laws is ideological scholarship at its worst—a scholarship that frantically and dishonestly strives to place racial consciousness at the center of equal protection analysis. Had these professors been bolder, they might have claimed that the Thirteenth Amendment, which abolished slavery, was an affirmative action program!

In 1997, the Texas legislature passed a law ordering the University of Texas to admit the top ten percent of all high school graduates. This admissions policy was admittedly designed to increase the number of underrepresented minorities at the University, but it attempted to do so in

a racially neutral manner. And while the policy did achieve a measure of success in increasing the number of minorities enrolled at the University, administrators were concerned that minorities chose a limited range of majors, so that racial and ethnic diversity was not manifest in every major and every classroom. The University reported that 90 percent of the "participatory size classes"—those enrolling 5-24 students—contained less than a "critical mass" of underrepresented minority students. It was these classes that provided what University administrators said was "the best opportunity for robust classroom discussion [and] the rich soil for diverse interactions." Furthermore, it was in these classes that "minority students reported feeling isolated" and that "a majority of all students felt there was insufficient minority representation in classrooms for the full benefits of diversity to occur." The University thus concluded that a race-conscious policy was necessary to ensure diversity in all classrooms and not just in those that minorities were apt to choose for themselves.

The fact that Texas has achieved significant diversity through non-racial means may compel the Supreme Court to reconsider its decision in *Grutter v. Bollinger*, the case that upheld affirmative action at the University of Michigan Law School. Another development that may favor reconsideration is the fact that Justice O'Connor, the author of the majority opinion in *Grutter*, has since been replaced by Justice Alito, who does not seem to have the same squeamishness about upholding equal protection rights.

In *Grutter*, Justice O'Connor argued that the University had unique First Amendment rights that gave the University great freedom to determine for itself the best methods of providing effective education. The Law School's diversity policy, the decision held, "promotes cross-racial understanding, helps to break down racial stereotypes," and provokes "livelier, more spirited and . . . more enlightening and more interesting classroom discussion." And, it concluded, if it was the considered opinion of the

HILLSDALE COLLEGE *Online Learning*

Sign up for free classes this fall!

CONSTITUTION 201

“The Progressive Rejection of the Founding and the Rise of Bureaucratic Despotism”

A ten-week online course

Sign up at

constitution.hillsdale.edu

HISTORY 101

“Western Heritage—From the Book of Genesis to John Locke”

A ten-week online course

Sign up at

online.hillsdale.edu

University faculty and administrators that racial and ethnic diversity served these essential educational purposes, then the Court would defer to their judgment. This was odd, given that when the Court is faced with racial classifications it rarely if ever defers to the good faith representation of the state actors who find them necessary. Rather, the Court automatically applies what it calls “strict scrutiny,” which presumes that racial classifications are unconstitutional unless the state can show they serve a compelling government interest and are narrowly tailored to serve that interest. In other words, the Court always presumes that racial classifications are in the service of invidious purposes.

Another surprising element of Justice O'Connor's opinion was her uncritical acceptance of the distinction between a racial quota and a “critical mass.” The Court seems to have agreed over the years that policies meant to fulfill racial or ethnic quotas are patently unconstitutional, clearly violating the principle that equal protection rights belong to individuals and not groups. In *Grutter*, the Law School insisted that its admissions policy did not mandate quotas but sought to assemble a “critical mass” of underrepresented minorities—not a specific number or percentage, but a “meaningful number,” a “meaningful representation,” or “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.” The Law School administrators did indicate, however, that they kept

a daily tally of the number of underrepresented minorities that were admitted to ensure that “critical mass” goals were being met. As Chief Justice Rehnquist pointed out in his dissent, a “critical mass” sounded suspiciously like a “quota,” especially since the numbers that satisfied the requirements of a “critical mass” were virtually the same as those that would constitute a racial or ethnic quota.

Justice Thomas wrote a powerful dissent in *Grutter* in which he concluded that whatever “marginal improvements” might be produced by the Law School's “racial tinkering” cannot “justify racial discrimination” and certainly cannot survive strict scrutiny analysis. Furthermore, he argued, the Court's reliance on social science evidence that “racial experimentation leads to educational benefits” might “have serious collateral consequences.” Thomas cited a growing body of social science evidence that purports to show that “racial (and other sorts) of heterogeneity actually impairs learning among black students,” including studies indicating that African-American students at Historically Black Colleges experience “superior cognitive development” and “higher achievement than those attending predominantly white colleges.” He then asks whether the Court would defer to the expertise of the administrators of an Historically Black College, if—using this social science evidence—they wanted to establish a race-conscious admissions program to promote racial homogeneity.

Justice Thomas's solution is as simple as it is elegant. The principles of the Constitution should not be subject to the faddish trends of social science. "The Constitution," he rightly contends, "abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all...." "For the immediate future," Thomas concluded, "the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause."

Curiously enough, the Court's failure to deal with the issue of racial classifications can be traced to the 1954 case of *Brown v. Board of Education*, not for its result—segregated schools did violate the Equal Protection Clause—but for its failure to declare that the Constitution was colorblind. In 1896, the Supreme Court had rendered its infamous "separate but equal" decision in *Plessy v. Ferguson*: As long as races were treated equally, the *Plessy* majority had said, segregation did not offend the Equal Protection Clause, because a mere separation of the races did not imply "a badge of inferiority." Justice Harlan, in a lone dissent, wrote, "Our Constitution is colorblind, and neither knows nor tolerates classes among citizens." Justice Harlan would have disallowed racial segregation as a matter of constitutional law. In the *Brown* case, however, Chief Justice Warren was disinclined to rely on the Constitution, writing that "we cannot turn the clock back to 1868" when the Fourteenth Amendment was adopted. Its "most avid proponents," Warren stated, "undoubtedly intended . . . to remove all legal distinctions" among citizens, but its opponents "were antagonistic to both the letter and the spirit [of the Amendment] . . . and wished . . . the most limited effect. What others in Congress and the state legislatures had in mind," he

continued, "cannot be determined with any degree of certainty." Why the opponents of the Fourteenth Amendment enter the calculus here is a mystery. After all, they lost! But in Warren's irrefragable logic, the fact that the opponents had another vision seems to cast doubt on any attempt to rely on the Constitution.

Rather, Warren decided that a more reliable basis for a decision was modern social science. Whereas *Plessy* had concluded that separate is not inherently unequal, by 1954 experimental psychology indicated that, at least in the context of grammar school education, a separation of the races creates a "feeling of inferiority . . . that may affect [the] hearts and minds [of school children] in a way unlikely to be undone." "Whatever may have been the extent of psychological knowledge at the time of *Plessy*," Warren concluded, "this finding is amply supported by modern authority." So the difference between the holdings in *Plessy* and in *Brown* was not a difference in constitutional construction, but a matter of developments in the science of psychology. Under the tutelage of Chief Justice Warren, modern psychology had replaced the Constitution for purposes of equal protection analysis. As a result, only those racial classifications that create "feelings of inferiority" are proscribed by the Constitution. This left open the question of whether racial classifications that are designed to benefit, rather than harm, a racial class violate the Equal Protection Clause.

The Supreme Court only needs to take one short step to do the job that *Brown v. Board of Education* failed to do. It should declare that the Equal Protection Clause of the Fourteenth Amendment commands a colorblind Constitution which neither knows nor tolerates classes among citizens. *Fisher v. Texas* should be the case where the Court completes the job. Some years ago, Justice Kennedy—who may provide a key vote in *Fisher*—wrote that "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause." I might add that it is the moral imperative of the Equal Protection Clause because it is the moral imperative of the Declaration of Independence. ■